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No. 91-1193

Supreme Court, U.S.
FILED
MAR 25 1992
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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NEW BERLIN GRADING CO., INC., ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in directing a single election in a unit including operators and mechanics, rather than permitting the mechanics to vote separately concerning union representation.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A21) is reported at 946 F.2d 527. The Board's Decision and Order in *New Berlin Grading Co.* (Pet. App. A32-A39) is reported at 297 N.L.R.B. No. 127. The Board's Decision in the underlying representation proceeding in *New Berlin Grading* (Pet. App. A22-A31) is unreported. The following cases were consolidated for review in the court of appeals with *New Berlin Grading: Sunny Slope Grading Co.*, 298 N.L.R.B. No. 24 (Apr. 11, 1990); *Schneider Exca-*

*vating, Inc.*, 298 N.L.R.B. No 57 (May 7, 1990); *Stoehr Grading Co.*, 299 N.L.R.B. No. 2 (July 13, 1990).

## JURISDICTION

The judgment of the court of appeals was entered on October 22, 1991. The petition for a writ of certiorari was filed on January 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The petitioners, four separate construction companies, are engaged in excavating and grading at construction projects throughout Wisconsin. Pet. App. A33-A34. Petitioners employ heavy equipment operators and mechanics who maintain the equipment. App., *infra*, 1a; Pet. App. A23-A25.[1] For nearly 20 years, petitioners, as members of multi-employer bargaining groups, voluntarily recognized and negotiated successive prehire collective-bargaining agreements with the International Union of Operating Engineers, Local 139, AFL-CIO (the Union), pursuant to Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f). The most recent agreements between the parties expired on

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[1] The appendix to the petition does not include the Board's decision on review of the Regional Director's Decision and Direction of Election in *New Berlin Grading*. See App., *infra*, 1a-4a. The petition also does not include the Board's decisions on directions of elections in the cases involving the other three petitioners in its appendix. As the court of appeals noted (Pet. App. A11), while there are some factual differences among the four cases consolidated for review in the court of appeals, those differences do not bear on the issues here. Accordingly, unless noted, the statement here will pertain to the Board's findings in *New Berlin*.

May 31, 1990, and May 1, 1991. Pet. App. A25-A26. While the collective agreements included the classification of "mechanics," in fact, the Union did not represent the mechanics, nor were the terms of the collective agreements applied to them. App., *infra*, 2a; Pet. App. A26-A27.

As a result of a change in the law affecting the rights of the Union as a signatory to prehire agreements under Section 8(f) of the Act, the Union determined to seek certification, under Section 9 of the Act, 29 U.S.C. 159, as the *elected* representative of a unit of each petitioner's heavy equipment operators and mechanics. Pet. App. A14, A22-A23.[2]

2. In directing an election among the operators and mechanics at petitioner New Berlin, the first of the instant cases to come before the Board, the Re-

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[2] Section 8(f) of the Act authorizes employers and unions in the construction industry to enter into bargaining agreements before an employee complement is hired and without regard to the union's majority status. In *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), the Board reevaluated the relationship established by a Section 8(f) agreement. Under prior law, if a union recognized under Section 8(f) represented a majority of the employer's unit employees at some point during the term of the prehire agreement, the agreement was "converted" to one under Section 9(a) of the Act, and the union was thereafter entitled to a presumption of continuing representative status. See *Deklewa*, 282 N.L.R.B. at 1378-1379. Under *Deklewa*, however, the conversion doctrine has been abolished and an employer is free to refuse continued recognition of the union upon expiration of a collective agreement. A Section 8(f) representative seeking the rights of a full-fledged majority union must file a representation petition or otherwise follow the certification process established under Section 9 of the Act. *Deklewa*, 282 N.L.R.B. at 1377, 1385.

gional Director concluded that the operators and the mechanics share a sufficient community of interest to constitute an appropriate bargaining unit. Pet. App. A26. However, the Regional Director also concluded that the mechanics should be accorded a self-determination election to determine whether they wished to be included in the unit, should the operators vote in favor of representation. *Ibid.*

On review, the Board agreed with the Regional Director that the operators and the mechanics constituted an appropriate unit. The Board noted "the multiple work-related contacts, significant common work locations, the high level of integration of operations, and the inclusion of the classification of mechanic in the existing collective-bargaining agreements." App., *infra*, 2a-3a. The Board cited its decision in *New Enterprise Stone & Lime Co.*, 172 N.L.R.B. 2157, 2158 (1968), where it had held that heavy equipment operators and mechanics constituted a "distinct functional grouping of construction employees" and that placement of them in the same unit accorded with its "policy of defining units along historical, functional lines in the construction industry."

However, the Board disagreed with the Regional Director that the mechanics were entitled to a separate self-determination election. Citing its decision in *D.V. Displays Corp.*, 134 N.L.R.B. 568, 571-572 (1961), the Board explained that "[w]hen, as here, there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis, the Board will direct only one election, including all employees in the unit found to be appropriate." App., *infra*, 3a.

Accordingly, in *New Berlin* and the three subsequent cases, the Board directed single elections in

units comprised of operators and mechanics. App., *infra*, 3a. In each case, the Union won the ensuing election and the Board certified the Union as the employees' exclusive bargaining representative in the petitioned-for unit. Pet. App. A34.

Petitioners refused to bargain with the Union following the Union's certifications, contending that the mechanics should have been given self-determination elections before being placed in units with operators. Petitioners did not, however, contest the Board's findings that units consisting of both operators and mechanics were appropriate for collective bargaining. The General Counsel issued complaints alleging that petitioners violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by their refusals to bargain. On motions for summary judgment, the Board found that petitioners had committed the alleged violations and directed petitioners to bargain with the Union on request. Pet. App. A34-A35.

3. The court of appeals affirmed the Board's decisions and enforced its orders. The court noted that petitioners did not contest the Board's finding that a bargaining unit consisting of both operators and mechanics was appropriate and it rejected petitioners' contention that the mechanics should have been accorded a separate election. Pet. App. A15-A16, A21. Observing that it is the Board's policy, where there is a question of representation raised concerning an existing historical bargaining unit, to include in the ensuing representation election a "previously unrepresented fringe group whom no other union is seeking to represent on a different basis" (*id.* at A19), the court found that policy to have been reasonably applied to the circumstances of this case. *Id.* at A18.[3]

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[3] Section 9(b) of the Act, 29 U.S.C. 159(b), requires the Board to determine whether the appropriate unit "shall be

The court rejected petitioners' argument that "no real question of representation existed among the operators because of their union membership and longstanding coverage under the § 8(f) agreement." Pet. App. A19. The court pointed out that "the operators had to be union members to keep their jobs. The union's support had never before been put to the test in an actual election, and the Board did not have to conclude that the operators' support for the union was a foregone conclusion." *Ibid.*

The court also rejected the argument that *D.V. Displays* was distinguishable because there, unlike here, "the exclusion of the fringe employees from the historical union had been an accident." Pet. App. A20. The court stated that, since the operators and mechanics constituted an appropriate unit, it was "reasonable [for the Board] to conclude that as in *D.V. Displays* a fringe defect existed—employees properly included in the unit were not included—and that a self-determination election would perpetuate this defect." *Ibid.* The court added that it is also "reasonable to conclude that directing only one election, rather than giving part of the unit what amounts to veto power over whether to be included, is more consistent with the Board's statutory responsibility to determine the appropriate unit." *Ibid.*[4]

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the employer unit, craft unit, plant unit, or subdivision thereof." It thereby gives "the Board a broad discretion to determine appropriate units." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

[4] On January 28, 1992, Justice Stevens denied petitioners' application for a stay of mandate. On February 24, 1992, the full Court denied petitioners' renewed stay application.

## ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), requires the Board, upon the filing of a petition, to hold a representation election if it determines that "a question of representation exists." Where there is an existing bargaining unit, the Board generally will not add "fringe employees"—those who are appropriately included in the existing unit but have not been previously represented—to the unit without according those employees a self-determination election to ascertain whether they want to be included in the unit. See *The Zia Co.*, 108 N.L.R.B. 1134 (1954). However, in *D.V. Displays Corp.*, 134 N.L.R.B. 568 (1961), the Board modified the policy enunciated in *Zia* and held that it would hold only one election among all the employees appropriately included in the petitioned-for unit where "there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis." *Id.* at 571.[5] The Board noted that "if the unit placement of [the] fringe group had been presented to the Board for determination at the time the historical unit was established, the Board would have included them." *Ibid.* The Board added that, once the unit placement of the fringe employees was put in issue, it was "more consistent" with its statutory mandate to determine the appropriate unit "to correct that fringe

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[5] Accord *Duke Power Co.*, 173 N.L.R.B. 240, 241 (1968); *Rostone Corp.*, 196 N.L.R.B. 467, 468 (1972).

defect in the historical unit" than to perpetuate it by allowing the fringe employees to opt out by means of a separate election. *Ibid.*

In this case, the Board found that a unit of operators and mechanics was appropriate.[6] The Board also found that there was a question of representation raised in the historical unit. Accordingly, the Board applied its *D.V. Displays* policy. In upholding the Board's decision, the court of appeals concluded that "[t]he Board's decision to apply the rule in *D.V. Displays* and to deny a self-determination election only among the mechanics was a reasonable exercise of its statutory authority to conduct representation elections." Pet. App. A21.

2. In contending that the Board improperly applied the rule of *D.V. Displays* to this case, petitioners quarrel (Pet. 18-20) with the Board's finding that there was a question of representation among the heavy equipment operators as well as among the mechanics. Petitioners contend that, because they had voluntarily recognized the Union on behalf of the operators for numerous years and the operators were union members, it cannot be said that there was any question regarding their interest in representation by the Union. However, as the court of appeals noted (Pet. App. A12), the operators were required, by the prehire agreements, to be union members to keep

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[6] The Board has consistently found, based on the functionally integrated nature of their work, that a unit of heavy equipment operators and mechanics is appropriate. See, *e.g.*, *Dick Kelchner Excavating Co.*, 236 N.L.R.B. 1414, 1415 (1978); *New Enterprise Stone & Lime Co.*, 172 N.L.R.B. 2157, 2158 (1968); *Del-Mont Construction Co.*, 150 N.L.R.B. 85, 87 (1964). While petitioners appear to question the propriety of that finding here (Pet. 15-16 n.9, 21-23), they did not raise the issue in their questions presented.

their jobs and had never had an opportunity to decide for themselves whether they wanted to be represented by the Union. In those circumstances, the Board reasonably concluded that the change in the Union's status occasioned by the Board's *Deklewa* decision created a question of representation in the historical unit. See *Duke Power*, 173 N.L.R.B. at 240 (voluntarily recognized union entitled to election to establish right to certification).

Petitioners' additional contention (Pet. 21-23) that the mechanics here are not comparable to the "fringe" employees involved in *D.V. Displays* is also mistaken. As the court of appeals noted (Pet. App. A20), the operative consideration is that, just as in *D.V. Displays*, absent the voluntary recognition of the operators by petitioners, the Board would have directed only one election among the operators and the mechanics had it directed an election at all. Accordingly, just as in *D.V. Displays*, the mechanics' exclusion from the bargaining unit "derives from historical accident rather than from any real difference in function or status." 134 N.L.R.B. at 571.

3. The Seventh Circuit recognized (Pet. App. A20-A21) that petitioner's reliance on prior circuit precedent was misplaced because no question of representation was at issue in any of the cited cases.[7]

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[7] See *NLRB* v. *Southern Indiana Gas & Electric Co.*, 853 F.2d 580, 581-582 (7th Cir. 1988), cert. denied, 488 U.S. 1031 (1989) (Pet. 13 n.8); *NLRB* v. *American Printers & Lithographers*, 820 F.2d 878 (7th Cir. 1987) (Pet. 13 n.8); *Chrysler Corp.*, 173 N.L.R.B. 1046 (1968) (Pet. 23); *Lubbock Typographical Union No. 888*, 196 N.L.R.B. 177, 178 (1972) (Pet. 23). The state case cited by petitioners (Pet. 14)—*School Board of Polk County* v. *Florida PERC*, 399 So. 2d 520 (Fla. Dist. Ct. App. 1981)—also involved no question of represenutation in the existing unit. In *Syracuse Uni-*

Petitioners acknowledge the distinction (Pet. 13-14 n.8), but simply reiterate their claim, which was rejected by both the Board and the court of appeals, that in this case as well no real question of representation existed among the operators.

Petitioners' reliance (Pet. 11) on *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294 (1937), is similarly misplaced. In *Globe*, three unions sought to represent different unit configurations of an employer's workforce. Finding all the petitioned-for units appropriate (*id.* at 299), the Board concluded that the employees should have an opportunity to choose among the petitioning unions in the various unit configurations. *Id.* at 300.[8] As the Board explained, the rule enunciated in *D.V. Displays* applies only where, as here, no other union seeks to represent the fringe group on a different basis.

Finally, petitioners err in contending (Pet. 10) that under Section 9(b) of the Act, "employee desire is to be the deciding factor in close cases" in making unit determinations. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146 (1941), which petition-

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*versity*, 204 N.L.R.B. 641, 643-644 (1973) (Pet. 13 n.7), the Board found that the law school faculty constituted an appropriate unit distinct from the university faculty, and accorded it a self-determination election because of the differences between the "academic world" and the Board's usual "industrial model." *Krambo Food Stores, Inc.*, 119 N.L.R.B. 369, 373-374 (1957) (Pet. 13 n.7), involved whether two separate stores should be added to an existing ten-store unit. *Fort Worth Stockyards*, 109 N.L.R.B. 1492 (1954) (Pet. 13 n.7), was decided prior to *D.V. Displays*.

[8] *NLRB* v. *Weyerhaeuser Co.*, 276 F.2d 865, 868-871 (7th Cir. 1960) (Pet. 13), involved a petition by a union pursuant to Section 9(b)(2) of the Act, 29 U.S.C. 159(b)(2), which provides for craft severance elections, to sever a distinct craft group from an overall industrial unit.

ers cite for that proposition, states only that "the wishes of employees are a factor in a Board conclusion upon a unit." *Id.* at 156. And see *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 62 (1975) (if majority of a unit chooses union representation, the Act permits that choice to be imposed upon the minority).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

**APPENDIX**

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Case 30-RC-4915

NEW BERLIN GRADING, INC., EMPLOYER
*Employer*

and

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 139, AFL-CIO
*Petitioner*

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## DECISION ON REVIEW AND ORDER

Petitioner's Request for Review of the Acting Regional Director's Decision and Direction of Election is granted as it raises substantial issues solely with regard to the propriety of the direction of two separate elections among the Employer's equipment operators and mechanics. In all other respects, the Request for Review is denied.

Having carefully reviewed the entire record, we conclude that the petitioned-for unit of operators and mechanics is an appropriate unit, and that a single election among those unit employees is proper.

The Employer, which is engaged in the excavating business, employs thirty-two equipment operators, three mechanics, and one apprentice mechanic. The

Petitioner seeks to represent a unit composed of both the operators and mechanics/apprentice mechanic. The Employer contends that the mechanics/apprentice mechanic lack a sufficient community of interest to be included in the unit with the operators.

The Employer has voluntarily recognized the Petitioner as the Section 8(f) bargaining representative of its operators for nearly twenty years. The Employer is currently signatory to two multi-employer collective-bargaining agreements with the Petitioner which cover the operators. Although the two agreements also include the classification of mechanic, the Employer has not paid contractual wages and benefits to the mechanics, nor has the Petitioner even initiated grievance proceedings on behalf of the mechanics.

The Acting Regional Director found that the mechanics shared a sufficient community of interest with the operators to justify a self-determination election as to whether they wished to be accreted to the recognized unit of operators. Accordingly, the Acting Regional Director directed two separate elections among the two groups of employees. If both groups voted in favor of representation by the Petitioner, an overall unit would be certified. If either of the groups voted against the Petitioner, appropriate certification would issue.

We agree with the Acting Regional Director that the operators and mechanics share a sufficient community of interest to make the petitioned for unit appropriate. In this regard, we note, as did the Acting Regional Director, the multiple work-related contacts, significant common work locations, the high level of integration of operations, and the inclusion of the classification of mechanic in the existing

collective-bargaining agreements. While we recognize that the two groups are separately supervised and possess different skills, we find that the degree of functional integration in this case, along with the other factors listed above, warrant a finding that the combined unit is an appropriate unit for bargaining. See *New Enterprise Stone and Lime Co.*, 172 NLRB 2157 (1968).

Given the appropriateness of the petitioned-for unit, a single election in that unit should have been directed. When, as here, there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis, the Board will direct only one election, including all employees in the unit found to be appropriate. *D.V. Displays Corp.*, 134 NLRB 568, 571 (1961). Contrary to the Acting Regional Director, the doctrine of accretion has no application to the facts of this case.

The election as directed by the Acting Regional Director took place on June 22, 1989, with the mechanics and apprentice mechanics voting under challenge. The ballots have been impounded pending the disposition of the instant Request for Review. We find that the unit herein found appropriate—that of operators and mechanics—differs significantly from the unit set forth in the Board's Notice of Election—that of separate units of operators and mechanics. Due to this variance, we find that a new election should be held. See *Coplay Cement Co.*, 288 NLRB No. 21 (Mar. 16, 1988).

Accordingly, the election conducted on June 22, 1989 is vacated and the case is remanded to the Regional Director for the purpose of conducting a new

election pursuant to the Decision and Direction of Election, as modified above, except that the payroll eligibility period shall be that period ending immediately before the date of this decision. The Employer shall furnish an updated *Excelsior* list within seven days from the date of this decision.

JAMES M. STEPHENS, CHAIRMAN

MARY MILLER CRACRAFT, MEMBER

JOHN E. HIGGINS, JR., MEMBER

Dated, Washington, D.C., July 14, 1989.

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